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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Marshall Edwin Home,

Defendant.

No. cr-11-2498-TUC-DCB (CRP)

**REPORT AND
RECOMMENDATION**

Pending before the Court is Defendant's Motion to Dismiss Counts 1 through 3 in the Superseding Indictment. (Docs. 184, 185). The Government contests Defendant's Motion. (Doc. 194). Oral argument was held before Magistrate Judge Pyle on December 17, 2012. (Doc. 196). Pursuant to 28 U.S.C. § 636(b)(1)(B) and LR Crim 57.6(d)(1) the Magistrate Judge submits to the District Court this report and recommendation, recommending the Motion be denied.

In the Superseding Indictment, Defendant is charged in Counts 1 through 3 with bankruptcy fraud. (Doc. 34). Specifically, he is charged with violations of 18 U.S.C. § 152(4) which provides:

a person who knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney shall be fined under this title, imprisoned not more than 5 years, or both.

A "debtor" under this chapter "means a debtor concerning whom a petition has been filed under Title 11." 18 U.S.C. § 151.

1 The charges against Defendant derive from a bankruptcy case in which Defendant
2 initiated a Chapter 11 involuntary bankruptcy against an entity he identified as “U.S.
3 Corp” and its “agents and/or instrumentalities.” (Doc. 185-1). In the bankruptcy case,
4 Defendant filed a number of proofs of claim on behalf of more than 70 alleged creditors
5 against U.S. Corp. (Doc. 185-7). Defendant filed these claims and other motions in the
6 bankruptcy case as part of an effort to avoid home foreclosures for the creditors. (*See*
7 Doc. 185-3). Within a month of Defendant initiating the bankruptcy case, the bankruptcy
8 court issued an order to show cause why the court should not limit Defendant’s filings.
9 (Doc. 185-5). After the show cause hearing, the bankruptcy court entered a written order
10 dismissing the case because U.S. Corp. was not a person, defined as an “individual,
11 partnership, and corporation” and even if it was a corporation, Defendant asserted it was
12 the United States and governmental units cannot be involuntary debtors, except in limited
13 circumstances not applicable. (Doc. 185-7).

14 In the current criminal case, Defendant seeks dismissal of the bankruptcy fraud
15 charges, arguing it was legally impossible for him to commit the crimes because the
16 statute under which he is charged requires a debtor to be defrauded. Defendant states U.S.
17 Corp. is not a real entity and thus, not a debtor and if it was a real entity, it would be a
18 governmental unit immune from the bankruptcy suit. (Doc. 184). Defendant concludes
19 because U.S. Corp. was either not a real entity or was a name Defendant used to refer to
20 the United States, it was legally impossible for him to commit the crimes charged in
21 Counts 1 through 3 since a real debtor did not exist or was immune from the bankruptcy
22 suit.

23 The Government contests dismissal of the charges, arguing Defendant conflates
24 legal impossibility with factual impossibility. As the Government argues, the
25 impossibility of success in Defendant’s scheme to defraud a debtor identified as U.S.
26 Corp. does not foreclose on the possibility that he violated the law when filing the
27 bankruptcy case against that entity. The Government maintains Defendant is properly
28 charged under the statute because he caused a bankruptcy case to be opened against an

1 entity he believed to be a debtor and he made false proofs of claims against that debtor.
2 The Government asserts the issue is not one of legal impossibility but rather, the burden
3 of proof required at trial. It will be the Government's burden at trial to prove beyond a
4 reasonable doubt that Defendant knowingly and fraudulently made false claims against a
5 debtor identified as U.S. Corp.

6 An indictment must be a "plain, concise, and definite written statement of the
7 essential facts constituting the offense charged . . ." Fed.R.Crim.Proc. 7(c)(1). An
8 indictment, sufficient on its face, cannot be challenged by arguing the allegations are not
9 supported by adequate evidence. *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir.1996)
10 (internal citations and quotation omitted). The question before the Court is whether the
11 Superseding Indictment sufficiently charges crimes against Defendant in Counts 1
12 through 3 when the debtor is identified as U.S. Corp. – an entity that is not real. "Legal
13 impossibility exists when the intended acts would not constitute a crime under the
14 applicable law. Factual impossibility refers to those situations in which, unknown to the
15 defendant, the consummation of the intended criminal act is physically impossible."
16 *United States v. McCormick*, 72 F.3d 1404, 1408 (9th Cir.1995).

17 The line between legal and factual impossibility is a murky one and one that the
18 Ninth Circuit has avoided drawing when possible. *United States v. Quijada*, 588 F.2d
19 1253, 1255 (9th Cir.1978). In *Quijada*, the Court considered whether a defendant could
20 be convicted of attempt to distribute cocaine when the substance he was attempting to
21 distribute was actually lidocaine hydrochloride, a noncontrolled substance that resembles
22 cocaine. *Id.* at 1254. In finding that the defendant could be convicted for attempting to
23 sell cocaine, the Court elected not to delineate between legal and factual impossibility
24 and rather, to focus on the defendant's intent. *Id.* at 1255. The Court stated "generally a
25 defendant should be treated in accordance with the facts as he supposed them to be. The
26 fact that the pocket was empty should not insulate the pickpocket from prosecution for an
27 attempt to steal." *Id.*

28 In a relatively recent Ninth Circuit case, the Court held legal impossibility was not

1 a defense to a charge of using the internet to attempt to induce a minor to engage in
2 sexual activity when the alleged minor was actually an adult undercover police officer.
3 *United States v. Meek*, 366 F.3d 705, 717-718 (9th Cir.2004). Like the Court in *Quijada*,
4 the Court in *Meek* focused on the required *mens rea*. “The guilt arises from the
5 defendant’s knowledge of what he intends to do.” *Id.* at 718. The Court found a jury
6 could reasonably infer that the defendant knowingly sought sexual activity with a minor.
7 *Id.*

8 In the case before this Court, Defendant is charged with “knowingly and
9 fraudulently” making false claims against a debtor. A jury could reasonably infer that
10 Defendant knowingly and fraudulently made the false claims against a debtor because
11 Defendant believed U.S. Corp. was a real entity and therefore it could be a debtor. This
12 issue remains for the jury to determine. A motion to dismiss “cannot be used as a device
13 for a summary trial of the evidence.” *Jensen*, 93 F.3d at 669.

14 **Recommendation**

15 The Magistrate Judge recommends the District Court deny the Motion to Dismiss.
16 (Docs. 184, 185). Pursuant to Federal Rule of Criminal Procedure 59(b)(2), any party
17 may serve and file written objections within fourteen days of being served with a copy of
18 the Report and Recommendation. If objections are not timely filed, they may be deemed
19 waived. Responses to objections are permissible. No replies will be permitted without
20 leave of the District Court. The parties are advised that any objections filed are to be
21 identified with the following case number: **cr-11-2498-DCB**.

22 Dated this 3rd day of January, 2013.

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25 **CHARLES R. PYLE**
26 **UNITED STATES MAGISTRATE JUDGE**
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